United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1138

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HERBERT DAVIS GORDON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE

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II.

TABLE OF CASES.

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Docket No. 76-1138

UNITED STATES OF AMERICA,

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v.

HERBERT DAVIS GORDON,

Defendant-Appellant.

Appeal From the United States District Court
For the Western District of New York

Preliminary Statement

Herbert Davis Gordon was charged in a three-count indictment filed with the Clerk of the United States District Court for the Western District of New York on October 9, 1975, with armed robbery of a federally insured savings and loan association and the assault of a teller during the commission of the robbery, in violation of Title 18, United States Code, Sections 2113(a), (b) and (d) (App. 1-2).

On January 29, 1976 a suppression hearing was held before District Court Judge John T. Elfvin to determine the admissibility of a .38 caliber gun (Gov. Ex. 7) lying on top of the bed in Gordon's room at a Dallas, Texas YMCA, as well as a white vinyl bag (Gov. Ex. 13) found in his closet further containing two twenty dollar bait

bills (Gov. Exs. 3 & 4) and a demand note (Gov. Ex. 8). Prior to commencement of the trial on January 30, 1976, the Judge ruled that the gun was admissible as a product of a search made incident to a lawful arrest and the other items admissible as products of a consent search (Tr. 6-7).[1]

Trial concluded on February 3, 1976 with a jury verdict of guilty on all three counts (Tr. 277-278). On March 15, 1976 the defendant was sentenced to the custody of the Attorney General for a period of 18 years (App. vii, 5-6). His Notice of Appeal was timely filed.

Statement of Facts

The Robbery

On October 3, 1975 at about 9:30 in the morning, the federally insured Homestead Savings and Loan Association, 360 Pearl Street, Buffalo, New York was robbed by a lone Negro male, armed with a handgun (Tr. 40-41, 58, 67-68, 92). The robber placed a white vinyl flight bag on the counter and handed the victim teller, Eileen Batt, a note demanding $60,000.00. He told her to remain silent and fill the bag with money (58-62). She complied by filling the bag with $685.54 including $200.00 in pre-recorded twenty dollar Federal Reserve Notes (45, 64-65, 72).

As he shoved the bag toward the victim teller, he displayed his weapon (Tr. 62), instilling in her, as well as co-employee, Frances Bialek, a fear that they might be shot (Tr. 63, 66, 88). That robber stood at the cage for approximately two minutes, directly in front of, and some 2 or 3 feet away from, Batt and Bialek (Tr. 67-68).

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[1] Reference to trial transcript.

Neighborhood Investigation

Gary McGuire, the Assistant Manager of the Greystone Apartments, Buffalo, New York, advised Lawrence Murphy, the Manager, that he had been watching the 11:00 news on October 3, 1975 relative to the robbery of the Homestead Bank when he recognized the exhibited photograph of the robber as a tenant by the name of Henry Gordon (Tr. 112, 116). Lawrence Murphy then reported that information to the F.B.I. (Tr. 116-117). Both McGuire and Murphy, as well as Irene Wolfe, a secretary at the apartments, identified the Negro male depicted in the photograph as Henry Gordon, a resident of the apartments for some 5 months (Tr. 101, 110, 114).

Those witnesses testified that on October 2, 1975 Gordon shipped his belongings to a YMCA in Dallas, Texas via Railway Express (Tr. 103, 107-108, 169). Thomas Nogaro, a driver for REA Express produced an REA Express receipt and testified that on October 2, 1975 he picked up several boxes for shipment to H. Gordon, YMCA, Dallas, Texas (Tr. 169, Gov. Ex. 32). The secretary also testified that at about 1:00 p.m. on October 3, 1975, Gordon came into the office and paid his account in full in cash (Tr. 102), and that he was carrying a white flight-type bag (Tr. 104, Gov. Ex. 12).

Dallas, Texas

The Dallas Office of the F.B.I. received information from the Buffalo Office that a warrant had been obtained for the arrest of one Henry Davis Gordon for bank robbery and that he should be considered armed and dangerous. It also received a facsimile of the surveillance photograph (Gov. Ex. 15) and a bait money list (Gov. Ex. 22, Tr. 119).

Armed with this information, F.B.I. Agents Meyer, Haynes and Lowell went to the Dallas, Texas YMCA, arriving there at about 3:00 p.m. on October 6, 1975 (Tr. 118-119). Meyer and Haynes then questioned personnel at the YMCA and learned that a Herbert D. Gordon was registered in Room 721 and had paid $97.50 for his room rental. They obtained a receipt and registration card (Tr. 122, Gov. Ex. 11).

Meanwhile, Agent Lowell stationed himself in the lobby and observed a man whom he testified resembled the Negro male depicted in the facsimile photograph. He watched as that individual got into the elevator and observed that the elevator stopped at the Seventh Floor (Tr. 122-123, 152). Agents Meyer and Haynes then took the elevator to the Seventh Floor (Tr. 122, 153). Agent Lowell remained in the lobby and checked through the bills Gordon gave to the YMCA clerk for payment. He discovered that two of the twenty dollar bills had the same prerecorded serial numbers as those taken from the Buffalo Bank (Tr. 122, 155).

When Agents Meyer and Haynes arrived at Room 721, Meyer knocked on the door. It was opened by a Negro male whom he testified resembled the individual in the facsimile photograph. He advised that individual that he was under arrest for bank robbery. Meyer then frisked him for weapons and cuffed his hands in front of him (Tr. 123-124, 141). The agent then asked him if there were any weapons in the room and Gordon made a positive nod with his head in the direction of the bed. Meyer then looked and saw a .38 caliber revolver in a holster which he picked up and unloaded (Tr. 124, Gov. Ex. 7). Meyer then immediately read the full panoply of *Miranda* warnings to Gordon, showed him the printed form (Gov. Ex. 12) and asked him to read it (Tr. 125-126, 142-143).

Gordon said he understood but would not sign without consulting with an attorney (Tr. 125-126, 143-145). Meyer then advised Gordon with respect to a search, read to him from a Consent to Search Form (Gov. Ex. 14), allowed him to read it and asked if he understood. Gordon responded that he did, that he had no objection to a search and signed the consent form (Tr. 146-148).

Meyer then conducted a search of the room and seized from the closet a white vinyl bag containing a demand note, ammunition, AmTrak train tickets and $336.65 in cash including two twenty dollar Federal Reserve Notes which were a portion of the bait money (Tr. 1[illegible] 131-132).

The agents then transported Gordon to the Dallas County Jail in a Bureau car. While in the car Meyer exhibited the facsimile photograph to Gordon and he responded by saying that even his mother would recognize him in that photograph. Gordon also said that the vinyl bag was utilized by him in the bank robbery (Tr. 133-134).

Batt and Bialek

The two tellers fully described the robber and identified Gordon as that man (Tr. 67-68, 88, 92). Each also fully described and identified the white vinyl bag and the gun (Tr. 68-69, 89) and Batt described and identified the demand note (Tr. 62).

Suppression Hearing

With respect to the appellant's claim that certain items or real evidence obtained from his Y.M.C.A. room were improperly admitted into evidence, namely, a .38 caliber gun, two $20.00 Federal Reserve Notes, a demand note, Amtrak tickets, .38 caliber ammunition, a white vinyl bag and other moneys, the only relevant testimony at the

hearing was that of F.B.I. Agent H. Lamar Meyer. His entire testimony is incorporated in the Appendix (App. iv, 35-95).

That testimony is virtually the same as his trial testimony and except that which here follows is set forth under the various arguments.

Agent Meyer testified that, prior to going to the downtown Dallas Y.M.C.A., his office had received information from the Buffalo F.B.I. office that a warrant had been obtained for the arrest of one Henry Davis Gordon for bank robbery and that he should be considered armed and dangerous. He also testified that his office received a facsimile of a surveillance photograph and a bait money list (S. 35-38).[2] Upon arrival, he learned that one Herbert D. Gordon was registered in Room 721 (S. 39). At about the same time, Agent Philip Lowell, who had been stationed in the lobby, told Meyer that he had observed a Negro male fitting the description of the male depicted in the surveillance photograph get on the elevator and stop at the seventh floor (S. 39-40).

Meyer and fellow Agent Haynes then went to the seventh floor and knocked on the door of Room 721 (S. 40). A male fitting the description opened the door. At that point Gordon was advised that he was being arrested pursuant to a warrant charging him with bank robbery in Buffalo, New York (S. 41). Gordon was then cuffed with his hands in front and asked if he had any weapons. He nodded in the direction of the bed, a mere step away. Meyer then observed and retrieved a .38 caliber handgun lying next to, or at best, partially under a jacket (S. 44-45, 71, 72).

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[2] Suppression Hearing testimony of H. Lamar Meyer. The page references are the same as those set forth in the appendix.

ARGUMENT

POINT I

Judge Elfvin's evidentiary rulings were proper and should not be disturbed by this Court.

A. The .38 caliber handgun seized from atop the bed was a product of a search incident to a lawful arrest.

Prior to the commencement of proof, the Court ruled the gun admissible, finding that the gun was only a step away from Gordon and that the arresting agents were not only justified, but had a duty to seize the weapon to protect themselves (Tr. 6). That ruling was correct. It is clearly the kind of search incident to an arrest approved in *Chimel v. California,* 395 U.S. 752 (1969).

While Gordon was handcuffed, his hands were cuffed in front of him and his legs were never shackled (S. 64). The room itself was only seven feet wide and ten and one-half feet in length and crowded with furniture (S. 22). Certainly, under these circumstances, a loaded gun on the bed immediately behind the appellant posed a danger to the arresting officers if not removed. As the Supreme Court stated in *Preston v. United States,* 376 U.S. 364, 367 (1963):

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as the need to prevent the destruction of evidence of a crime—things which might easily happen when a weapon or evidence is on the accused person or under his immediate control.

Searches broader than that occurring here have been approved by this Court. For example, in *United States v. Manarite,* 448 F.2d 583 (2d Cir. 1971), this Court found that a gun and .32 caliber ammunition found *in a closet* [emphasis added] in the apartment in which the defendant

was arrested was a lawful search and seizure entirely within the scope of *Chimel, supra.* Likewise, a District of Columbia Appeals Court held that a search and a seizure of a weapon found *under a mattress* [emphasis added] in defendant's apartment after he was in custody was necessary because he was known to be armed and the apprehending officers had a right to protect themselves. *United States v. Williams,* 454 F.2d 1016 (D.C. Cir. 1972).

Gordon's reliance on *United States v. Patterson,* 447 F.2d 424 (10th Cir. 1971) to demonstrate his restraint is misplaced. There the officers cuffed the arrestee's hands behind him which certainly had a more limiting effect upon his movements. Further, the search was much broader to the extent that the officers there went inside the dresser drawers. That case is markedly different from *Williams,* which is factually similar to the instant case. Of course, the area of the search is greatly increased when one considers that the arrestee has the ability to freely move his legs. See *United States v. Mason,* 523 F.2d 1122 (D.C. Cir. 1975). Here, Gordon had that ability.

Moreover, while the judge, for purposes of his decision, assumed the gun was not in plain view, he could well have ruled it admissible on that ground. The testimony of Agent Meyer both at the suppression hearing and at the trial supports that view. That testimony was that the weapon was either alongside the jacket on the bed or only partially under the jacket (S. 71, Tr. 124). Under either view, the gun was clearly in "plain view" and subject to seizure. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Kerr v. California,* 374 U.S. 23 (1960); *Davis v. United States,* 327 F.2d 301 (9th Cir. 1964); *Gilbert v. United States,* 366 F.2d 923 (9th Cir. 1966).

B. The other items of real evidence seized from the closet were the product of a consent search and properly admitted into evidence.

Judge Elfvin also ruled that the real evidence seized from the closet of Gordon's Y.M.C.A. room was admissible, namely, the white vinyl bag (Gov. Ex. 13), the demand note (Gov. Ex. 8) and the two $20.00 Federal Reserve notes (Gov. Exs. 3 & 4) as the product of a consent search (Tr. 7).

The facts adduced at the suppression hearing and again upon trial clearly support that decision. Immediately upon entering Gordon's room, the agents advised him that he was under arrest for bank robbery (S. 41). Agent Haynes then cuffed his hands in front of him (S. 65-66). Agent Meyer then sat on the bed with Gordon and advised him of his rights pursuant to *Miranda* (S. 42-43). Meyer then asked him if he understood his rights and he replied in the affirmative (Tr. 145). Though he was then given the opportunity to use the telephone to call anyone he wished, he chose not to exercise that opportunity (Tr. 144-145). Agent Meyer then produced a consent to search form (Gov. Ex. 14) and read it to Gordon and then gave it to Gordon to read. Gordon said he understood, had no objection to a search and signed (S. 48-50, Tr. 146-147, Gov. Ex. 14).

The circumstances surrounding that permission to search include the fact that the agents were only with Gordon for a period of perhaps twenty to thirty minutes (S. 56, 81, 92). During that period of time the agents asked him but three questions (S. 95). And at the time Gordon consented to the search, the agents, neither of whom ever drew a weapon, had only been with him for some ten to fifteen minutes (S. 50, 91). In other words, despite the fact that Gordon was in custody, there was no

overbearing by the agents nor any extensive interrogation. In addition, Gordon was no novice in these matters. He told Agent Meyer that he had just been out of prison for a year (S. 76) and, in fact, as his counsel stated at the time of sentencing, he spent some nineteen years in prison for different crimes (Tr. Sentence 2).[3]

The fact of custody is only one circumstance to be considered under the "totality of circumstances" rationale of *Schneckloth v. Bustamonte,* 412 U.S. 18 (1973). It does not vitiate the consent. *U.S. v. Weiner,* ..... F.2d ....., Slip Op. 2753 (2nd Cir. March 24, 1976). Nor was there any psychological coercion or threats, either explicit or implied. In short, "there was no credible evidence of any inherently coercive tactics". *United States v. Miley,* 513 F.2d 1191, 1201, n. 6 (2nd Cir. 1975).

Here too, the appellee asserts that the seizure of the white vinyl bag and its contents, including the 9mm gun (Gov. Ex.), could have also been ruled admissible as the product of a contemporaneous search under the *Preston v. United States, supra,* line of cases. The gun contained in the white vinyl bag was certainly in an area within the immediate control of Gordon and is certainly an area into which Gordon could have reached in order to grab the weapon or the evidentiary items contained therein. Gordon's room was a mere seven feet wide by ten and one-half feet in length (S. 42) and the closet containing these evidentiary items, including the suppressed 9mm gun, was at best only four feet from Gordon (S. 42, 76, 77-78). Under these circumstances, there was no violation of Gordon's Fourth Amendment right against an unreasonable search. See *United States v. Mason, supra,* at 1125-1126.

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[3] Reference to transcript of sentencing.

At the very least, the judge's findings are not totally unsupported by the evidence. In such circumstances where "it does not clearly appear that the findings are not supported by any evidence" an appellate Court should not intervene. *United States v. Johnson,* 327 U.S. 106, 112 (1946); *United States v. Fabric Garment Co.,* 262 F.2d 631, 642 (2nd Cir. 1958); *United States v. Bracer,* 342 F.2d 522, 524 (2nd Cir. 1965); *United States v. Boston,* 508 F.2d 1171, 1179 (2nd Cir. 1974); *United States v. Brownstein,* 521 F.2d 459, 463 (2nd Cir. 1975).

POINT II

Even if all fruits of the search should have been suppressed, no prejudice resulted because the conviction was based on otherwise overwhelming evidence.

The gun, the flight bag, the two bait bills and demand note aside, proof of Gordon's guilt was still overwhelming. Both Batt and Bialek identified him as the robber. Two additional bait bills were used by him to pay his room rent at the Y.M.C.A. He admitted to Agent Meyer that he robbed the bank (Tr. 134, 158). Even that evidence aside, the jury was able to make its own determination by viewing the remarkedly clear surveillance photographs (Gov. Exs. 18, 26 and 28, Tr. 39-40) that Gordon was the robber. Under these circumstances, no prejudicial error resulted. In other words, assuming those exhibits were erroneously admitted, they were merely cumulative of the other overwhelming and uncontroverted evidence properly before the jury. The conviction, therefore, must stand. *Chapman v. California,* 386 U.S. 18 (1967); *Brown v. U.S.,* 411 U.S. 223, 231 (1973); *Harrington v. California,* 395 U.S. 250 (1969); *U.S. ex rel. Springle v. Follette,* 435 F.2d 1380 (2nd Cir. 1970), cert. denied 401 U.S. 980; *U.S. v. Williams,* 523 F.2d 457 (2nd Cir. 1975).

POINT III

The Court did not abuse its discretion in imposing a term of eighteen years imprisonment.

Conviction under Title 18, United States Code, Section 2113(d) provides that the defendant shall be fined not more than $10,000 or imprisoned more than 25 years, or both. The eighteen year term of incarceration imposed by Judge Elfvin was well within the statutory limits and it is axiomatic that Federal District Judges are given vast discretion in the imposition of sentences and any sentence imposed within the statutory limit is generally not subject to review. *United States v. Tucker*, 92 S.Ct. 589 (1972); *Gore v. United States*, 357 U.S. 386 (1958); *United States v. Jones*, 444 F.2d 89 (2d Cir. 1971); and certainly, "not where the sentence is not so irrational as to amount to a denial of due process." *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973).

Conclusion

For all the above reasons the judgment of conviction should, in all respects, be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: United States
vs
Herbert Davis Gordon

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Leslie R. Johnson

Sworn to before me this

11th day of June, 1976

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977